APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed FEB. 16, 2007]

01-14735-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SERGES JACQUES DESCENT,
a.k.a. Jack Descent,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

The Court issued its mandate in this appeal on June 26, 2002. Appellant's *pro se* "Motion to Recall and Amend Mandate" presents no good reason why the Court should accept the motion for filing in this long-closed appeal. The Clerk is directed to return the "Motion to Recall and Amend Mandate" unfiled and to accept no further filings in this appeal.

/s/ [Illegible]
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed JAN. 24, 2007]

No. 01-14735-EE

SERGES JACQUES DESCENT,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

MOTION TO RECALL AND AMEND MANDATE

COMES NOW, the Petitioner-Appellant, SERGES JACQUES DESCENT, pro se, hereinafter known as "Mr. Descent" or "Petitioner," pursuant to Eleventh Circuit Rule 41-1(b), and submits this "Motion to Recall and Amend Mandate" regarding the above referenced case number in which was decided on May 28, 2002, and states as follows:

REASON FOR LATENESS PURSUANT TO
11th Cir. 41-1(c)

On direct appeal, this Court found that the district court erred in modifying the jury instructions related to forfeiture, and vacated and remanded the case for entry of a new forfeiture amount of $1,288,140.00. Mr. Descent asseverates that he has exhausted all remedies that was available to him. Mr. Descent diligently sought relief via Title 28, Sections 2255 and 2241. Mr. Descent realized that when this Honorable Court remanded his case for a lower forfeiture amount, this action ultimately placed him in a lower sentencing category. Mr. Descent further acknowledges that

while he was aware of a sentencing error, he was not aware that the Eleventh Circuit would require a showing of good cause in order to recall its mandate after the expiration of a one (1) year time limit of its issuance.

Additionally, Mr. Descent is not relying on this motion as a vehicle to circumvent other procedures; nor is he asking that negligence of the law be a determining factor of good cause. Mr. Descent is asking that this Court to view the facts as a whole, resting on the grounds of the need to avoid injustice.

THE GOOD CAUSE REQUISITE

In Greater Boston Television Corp. v. FCC, 149 U.S. App. D.C. 322, 463 F.2d 268,277 (CADC, 1971) the court expounded that "[i]n the absence of express provision on recall of appellate mandate, in either FRAP or the Rules of our court, we turn to general doctrine. In our view that doctrine has the same content as the rule of court discussed in *Hines v. Royal Indemnity Co.*, 253 f.2d 111,114 (6th Cir. 1958); 'A mandate once issued will not be recalled except by order of the court for good cause shown.' The 'good cause' requisite for recall of mandate is the showing of need to avoid injustice." (emphasis added).

This doctrine in in parallel to Mr. Descent's case at bar as the forfeiture amount was the determining factor of the appropriate guideline range. In essence, Mr. Descent has been prejudiced as the new forfeiture amount changed his guideline range, thereby manifesting an injustice as Mr. Descent is now being punished beyond the guideline range that he was adjudicated on.

RELIEF SOUGHT

Petitioner prays that this Honorable Court will recall its mandate and amend it to be remanded for resentencing to be consistent with the new forfeiture amount.

I. Statement of Case

On November 21, 2000, a federal grand jury in Tampa, Florida, returned a superseding indictment charging Mr. Descent with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. Section 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. Section 1956(h); twenty-six counts of mail fraud, in violation of 18 U.S.C. Sections 1341, 2326 and 2; twenty-four counts of money laundering, in violation of 18 U.S.C. Section 1957; and five counts of money laundering, in violation of 18 U.S.C. Section 1956.

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months' imprisonment, three years supervised release and pay restoration in the amount of $1,512,774.81. On May 28, 2002, the Appellate Court entered a decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert. denied*, 537 U.S. 1132 (Jan. 13, 2003). The appellate court found, however, that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

II. Argument

During the course of Mr. Descent's Sentencing Proceedings, his attorney vehemently argued the forfeiture amount in question, asseverating that an amount of $400,000 should not be incorporated into the forfeiture amount. Additionally, Mr. Descent petitioned the court for leniency as the forfeiture amount of $1,688,845 was $100,000 over the threshold of $1,500,000 which would add one more level to his Base Offense Level. (By applying the sentencing guidelines [2000], more than $1,500,000 and less than $2,500,000 would subject Mr. Descent to one more level in his offense level. (U.S.S.G. 2F1.1)).

During objections, Mr. Descent's attorney stated:

"MR. FELDMAN: There is a range there of a loss of 1.5 million to 2.5 million that is treated the same. He's just $100,000 over into the next category. So he's being treated the same way as if he committed a $2.5 million fraud instead of a $1.6 million fraud."

"THE COURT: That would be one point difference. What difference would that have made in the guidelines?"

"MR. FELDMAN: It would make a one-level difference in the guidelines."

"THE COURT: Which is what?"

"MR. FELDMAN: So we'd be at 29, rather than 30."

"THE COURT: Which is what?"

"MR. FELDMAN: A 29 is 87 to 108 months. So it is roughly ten months difference on the low end and something greater than that on the high end." R71:22-72:11.

This was not the only time this subject was addressed. In the Sentencing Proceedings from R7:24 to R81-13, the following was addressed:

"THE COURT: Is one and a half million some sort of cutoff on the guidelines?"

"MR. FELDMAN: Let me check—there is a—there is a difference in the range. Let me—I'm not sure exactly where the cutoff is."

"MR. MONK: [AUSA] There is."

"MR. FELDMAN: Is it 1.5?"

"MR. MONK: Yes."

"THE COURT: What's the difference in the range?"

"MR. MONK: One level."

"THE COURT: One level? Okay."

The crux of this uncovers the fact that when his judgment was overturned, his case was remanded with instructions to enter a new forfeiture judgment in the amount of $1,288,140, which also would have placed Mr. Descent in a different base level sentencing category, as he is now under the $1,500,000 guideline range.

As Mr. Descent has shown this Honorable Court, it is axiomatic that the district court acknowledged that a lower forefeiture amount would award him a one-level adjustment. The Sentencing Court determined that the applicable guidelines are a Total Offense Level 30, Criminal History Category I. (R69:17-19).

If you were to juxtapose this case at bar with *Estate of Lisle v. Comm'r*, 431 F.3d 439 (5th Cir. 2006) you can see a relationship as the Fifth Circuit granted and recalled its mandate, identifying the unusual circumstances and to preserve 'the interest of fairness', and to prevent possible injustice.

In *Malik v. Brown*, 65 F.3d 148; 1995 U.S. App. LEXIS 25258 (9th Cir. 1995), it came to the attention of the court that Congress adopted the Religious Freedom Restoration Act (RFRA) prior to the date their opinion was filed. And, "RFRA was not called to our attention by the parties in a post-filing petition. Our research did not disclose its existence prior to filing." Upon this information the court recalled its mandate.

Likewise, *Brown* makes a reflection to the degree that at the time this Court rendered its decision, the issue was not presented that this would ultimately place Mr. Descent into a different guideline range.

III. Conclusion

WHEREFORE, in light of the aforementioned and in the interests of justice, Mr. Descent respectfully prays this Honorable Court to grant the Motion To Recall and Amend Man-

date, and remand with instructions to resentence Mr. Descent from 120 months to a comparable sentence of 107 months (using a Base Offense Level 29, Criminal History Category I), and any other relief this Court deems proper and just.

Respectfully submitted,

/s/ Serges Jacques Descent
SERGES JACQUES DESCENT
USM# 39101-018
FCC Coleman Low
P.O. Box 1931
Coleman, FL 33521-1031

Dated: 01/22/2007.

APPENDIX C

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

March 06, 2007

Serges Jacques Descent
Coleman FCI-Low
PO BOX 1031
COLEMAN FL 33521-1031

Appeal Number: 01-14735-EE
Case Style: *USA v. Serges Jacques Descent*
District Court Number: 00-00186 CR-T-30

The following action has been taken in the referenced case:

Per the order dated 2/16/07, the clerk is directed to accept no further filings in this appeal. Therefore, enclosed please find your motion for reconsideration returned unfiled.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Brenda Wiegmam (404) 335-6174

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 5, 2007]

01-14735-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SERGES JACQUES DESCENT, a.k.a. Jack Descent,
Defendant-Appellant.

SERGES JACQUES DESCENT'S Fed.R.Civ.P.59(e) Motion To Alter, Amend, or Correct Order Denying Motion to Recall And Amend Mandate and Memorandum of Law in Support Thereof

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COMES NOW, the Defendant-Appellant, SERGES JACQUES DESCENT, hereinafter known as "Mr. Descent" or "Appellant," in the above entitled numbered cause who files this, his Fed.R.Civ.P.59(e) Motion to alter, amend or correct this Court's order denying Motion to Recall and Amend Mandate, and in support thereof states as follows:

I. INTRODUCTION

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months imprisonment, three years supervised release and pay restitution in the amount of $1,512,774.81. On May 28, 2002, the Appellate Court entered a decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert. denied*, 537 U.S. 1132 (Jan 13, 2003). This Court found, however, that the

district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

On January 24, 2007, Mr. Descent filed a Motion to Recall and Amend Mandate because when the forfeiture judgment was corrected, that action ultimately placed him in a different sentencing category (i.e., from level 30 to level 29). On February 16, 2007, this Court entered an order denying Mr. Descent's motion to Amend and Recall Mandate, stating that no good reason was presented. In so doing, this Court held:

> This Court issued its mandate in this appeals on June 26, 2002. Appellant's *pro se* "Motion to Recall and Amend Mandate" presents no good reason why the court should accept the motion for filing in this long-closed appeal. The Clerk is directed to return the "Motion to Recall and Amend Mandate" unfiled and to accept no further filings in this appeal.

ORDER, dated 2/16/2007, at p.1

Mr. Descent now moves this Court for reconsideration of its order pursuant to Fed.R.Civ.P.59(e). Mr. Descent respectfully submits that good reason was shown for this Court to re-open this long-closed appeal and to correct the mandate as a matter of law.

II. LEGAL DISCUSSION

Mr. Descent moves this Court to alter, amend or correct its order denying his motion to Recall and Amend Mandate for presenting no good reason. This motion is sanctioned under Federal Rules of Civil Procedure 59(e).

A. Fed.R.Civ.P.59(e)—The Law.

A motion to alter or amend a judgment pursuant to Fed.R.Civ.P.59(e) must be filed with the clerk of the court within ten (10) days after entry of judgment. See: Fed.R.Civ.P.59(e); *Jones v. UNIM Life Ins. Co.*, 223 F.3d

130, 136 (2nd Cir. 2000). The ten day deadline under Rule 59(e) is jurisdictional and may not be extended by waiver, agreement of the parties or by the court. Fed.R.Civ.P.6(a); *U.S. Leather, Inc. v. H&W Partnership*, 60 F.3d 222, 225 (5th Cir. 1995); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994).

There are three grounds for amending a judgment, one of which is to correct a clear error of law or to present manifest injustice. *Servants of PAcaclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). When a party filed a motion under Rule 59(e) showing that judgment contains a clear error of law, the district court should resolve the issue by granting the motion. *See, e.g., Collision v. International Chem. Workers Un. Local 217*, 34 F.3d 233, 238 (4th Cir. 1994); *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995). The same is true of an order on a clear factual error. *Norman v. Arkansas Dept. of Educ.*, 70 F.3d 748, 750 (8th Cir. 1996).

A. THE REQUISITE OF GOOD REASON WHY THIS COURT SHOULD ACCEPT THIS MOTION.

1. INJUSTICE. Mr. Descent asseverates that he was prejudiced as this Court did not consider Appellant's "good cause" showing of an injustice that needs to be prevented by recalling the mandate.

Black's Law Dictionary defines "injustice" as "1. An unjust state of affairs; unfairness. 2. An unjust act." *Black's Law Dictionary,* Eighth Edition, p.802. Mr. Descent adduced in his motion to recall the mandate that when this Court vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00, it moved him to a different Sentencing Level resultant of this Court's decision. (See: *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002) May 28, 2002).

In *Greater Boston Television Corp. v. FCC*, 149 U.S. App. D.C. 322, 463 F.2d 268, 277 (CADC, 1971), the court expounded that "[i]n the absence of express provision on recall of appellate mandate, in either FRAP or the Rules of our court, we turn to general doctrine. In our view that doctrine has the same content as the rule of court discussed in *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958); 'A mandate once issued will not be recalled except by order of the court for good cause shown.' The 'good cause' requisite for a recall of mandate is the showing of a need to avoid injustice."

Mr. Descent was sentenced to 120 months incarceration on August 7, 2001. This was predicated on his original forfeiture judgment of $1,512,774.84, which, in accordance with the Sentencing Guidelines [2002], places him at Level 30, Category I (97 to 121 months). This Court on May 28, 2002, vacated Mr. Descent's Judgment and remanded the case to the district court to enter a new forfeiture judgment in the amount of $1,288,140.00.

Using the same Guidelines to apply the new forfeiture judgment of $1,288,140.00 also moves the Appellant from Level 30 to Level 29 (87 to 108 months).

When Mr.. Descent was resentenced, the lower court failed to apply the variance in the levels to be consistent with this Court's order. As a result of this injustice, Mr. Descent is serving 18 months over that which he was adjudicated on, as it is axiomatic that the Appellant should have been resentenced within the scope of 87 to 108 months.

This case is analogous to *Estate of Lisle v. Comm'r*, 431 F.3d 439 (5th Cir. 2006), where the Fifth Circuit has recalled its mandate, identifying the unusual circumstances and to preserve "the interests of fairness", and to prevent possible injustice.

Additionally, in *Malik v. Brown*, 65 F.3d 148, 1995 U.S. App. LEXIS 25258 (9th Cir. 1995), the Ninth Circuit recalled its mandate when the court learned of the absence of information prior to its filing. Likewise, if you juxtapose *Brown* to this case at bar, a similarity can be drawn that at the time this Court made its filing, it was unaware of the Level adjustment that must occur.

2. TIMELINESS

Mr. Descent avers that he made a proper showing of "good cause" why this Court should entertain his motion past a one-year deadline after issuance of the mandate as promulgated in the Eleventh Circuit's Local Rule 41-1(c). Unfortunately, the Court did not take into consideration the Appellant's due "diligence" to properly exhaust all remedies available to him in the lower courts before turning back to the Appellate Court, which, in turn, was responsible for his unforeseeable lateness in this Court. Had the lower court resentenced Mr. Descent to a lower guideline level, this issue would be moot. The delays in the lower court by collaterally attacking his sentence precluded Mr. Descent from filing this Motion to Recall sooner. Based on this good reason for the delay in filing the motion, this Court should accept Mr. Descent's motion.

III. CONCLUSION

WHEREFORE, the Appellant, SERGES JACQUES DESCENT, requests this Honorable Court to grant the instant motion based on the foregoing facts and law, and enter an order granting same and any other relief this Court deems proper and just.

Respectfully submitted,

February 28, 2007
Coleman, Florida.

SERGES JACQUES DESCENT

USM# 39101-018
FCC Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

VERIFICATION

I SERGES JACQUES DESCENT, hereby verify and affirm that the foregoing facts and law are true and correct, done under penalties of perjury on this 28th day of February, 2007.

/s/ Serges Jacques Descent

SERGES JACQUES DESCENT